No. 95-2044

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

LARRY RAY and JACQUELINE RAY,

Petitioners,

against

POLICE OFFICER BLAKE WILLETT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION FOR THE SECOND DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS

STATEMENT OF THE CASE

The Amended Complaint against BLAKE J. WILLETT included claims for battery and false arrest/imprisonment and a civil rights cause of action pursuant to 42 U.S.C. §1983. After a post-trial traverse hearing the trial court dismissed the (one-year) causes of action based on battery and false arrest/imprisonment upon finding that the summons and complaint had not been properly and timely served upon BLAKE J. WILLETT.[1]

While the petitioners suggest (at page 5 of their brief) that the "amended complaint including the cause of action under 42 U.S.C. §1983 was properly served on Officer Willet," the trial court did not reach this issue. The defenses of improper service of process and limitations remain as alternative defenses to the civil rights claim. Defendant WILLET's cross claim against the co-defendant LONG ISLAND RAIL ROAD for indemnity was severed.

At the conclusion of the trial the jury was instructed (over objection by defense counsel) that Mr. RAY claims to have been deprived by BLAKE WILLETT, "of a right guaranteed by the Constitution of the United States, namely, the right to be free from bodily injury ..." (R 1724 [2], 1610-12). In order to find a

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[1] Counsel's failure to serve the original summons and complaint gives plaintiffs a potential cause of action for legal malpractice. Counsel for Petitioners are on notice of the need to review all applicable ethical obligations relating to the continued representation.

[2] References are to pages in the Record on Appeal to the Supreme Court of the State of New York Appellate Division for the Second Judicial Department.

civil rights violation the jury was further instructed that they need only find that the force used was "unnecessary" and that BLAKE WILLETT "acted under color of law" (R 1726-7). The Court explained that the harmful acts "must have been of a kind that occurred under the circumstances that would not have existed but for the fact that BLAKE WILLETT was a police officer using or purporting to use his official powers" (R 1335). Counsel for plaintiffs did not object to the jury instructions since they were substantially identical to the written Request For Jury Instructions submitted on behalf of plaintiffs (R 1931-34).

Testimony provided largely by Mr. RAY amply supported the jury's finding that the harmful acts were not committed under color of law.[3] The verbal dispute began over instructions relating to the locked bathrooms at the Long Island Rail Road level of Pennsylvania Station. The conversation took place only a few feet from the Long Island Rail Road police headquarters and Mr. RAY believed that he was being challenged to engage in a consensual fight (R 642, 648). Mr. RAY responded to the threat by saying, " ... What do you mean, I am not stupid. I am not going to get it on with you right here in front of the police office. ... Well, we could go to the loading docks" (R 520). According to Mr. RAY, defendant WILLETT was willing to fight "either now or later" (R 646). From this conversation alone the jury could have reasonably inferred that Mr. RAY agreed to fight, if and only if Police Officer WILLETT would forgo his authority as a police officer and engage in a private consentual fight outside of Long Island Rail Road property and removed from any Long Island Rail Road police presence.

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[3] Blake J. Willett offered testimony and evidence to contradict Mr. Ray's version of the facts but is not estopped from arguing and relying upon alternative and conflicting proof which may enure to his benefit.

Mr. RAY contended that after he originally consented to fight defendant, he continued with his work changing two sets of buckets and that at least five to seven minutes elapsed each time plaintiff changed the buckets (R 521). At 4:00 a.m. Mr. RAY's supervisor told him to go to lunch (R 523). At this point, plaintiff contends that the folloiwng exchange took place:

WILLETT: You are ready, let's go.

RAY: Go where?

WILLETT: Go to the loading docks.

RAY: Well, I am going to lunch.

(R 521-22). By virtue of the above exchange, the jury could have, but was not required to, find that appellant RAY withdrew his consent to go to the loading docks and to engage in a consentual fight.

After Mr. RAY told defendant WILLETT that he was going to lunch, Mr. RAY walked down the Hilton passageway. As Mr. RAY approached the Ogden Allied Office, he slowed down to get a hero sandwich for lunch and WILLETT allegedly said, "Come on, let's go. I am going to show you 'big mouth' when I tell you something, you are going to do it" (R 527). Although appellant RAY contended that he followed defendant WILLETT because "he was a police officer and I am supposed to do what he told me to do", the jury was free to reject this self-serving claim of police authority (R 528). The jury was free to find that defendant WILLETT was acting as a "bully" [as he was characterized by plaintiffs' counsel during summation] (at R 1675-76) and that defendant WILLETT had every intention of abandoning his role as police officer forcing plaintiff to adhere to the prior

agreement to go to the loading dock (or battery charge area) and engage in a consensual fight.

The reasonableness of a jury's finding in this manner was buttressed by Mr. RAY's contention that WILLETT turned off his police radio (R 530, 810), thereby clearly indicating that he had gone off duty as a police officer. It is also supported by Mr. RAY's contention that WILLETT took off all his articles of police clothing (i.e., gunbelt, shirt and bulletproof vest) when he arrived at the battery charge area and before any wrestling took place (R 529-30).

The jury's finding that police officer WILLETT did not act under color of law is also consistent with the finding that he was not acting within the scope of his employment. In affirming the dismissal of the complaint as to the co-defendant LONG ISLAND RAIL ROAD, the Appellate Division noted that, " ... liability will not attach where, as here, the tort is committed solely for personal motives of the employee unrelated to the furtherance of the employer's business. WILLETT'S act of taking RAY to a secluded area and beating him was a gross departure from his normal duties and fell well outside the scope of his employment" (citation omitted).

The jury also demonstrated a selective view of the evidence when it rejected plaintiffs' claims for future economic losses and made no award for future pain and suffering. Similarly, the mere fact that WILLETT eventually placed handcuffs upon Mr. RAY and brought him to police headquarters did not require a jury finding that the earlier harmful acts were done under color of law.

POINT I

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED SINCE THERE HAS BEEN NO MISSTATEMENT OF THE LAW

The focus of the Petition rests upon a claimed misapplication of the law to a trial in which all of the critical facts were disputed. Essentially, Mr. RAY contended that he was unnecessarily subject to bodily harm, BLAKE WILLETT contended that he used proper force to make a lawful arrest and the LONG ISLAND RAIL ROAD contended that RAY and WILLETT engaged in a consensual fight while each was off duty.

On review of the jury's determination that defendant, WILLETT, did not act within the scope of his employment under color of law, the role of the Court was to determine whether there are any facts on which a reasonable jury might conclude that the acts were committed for essentially personal motives. Clearly, " ... acts of officers in the ambit of their personal pursuits are plainly excluded." Screws v. United States, 325 US 91, 111 (1945).

> Even in circumstances where jurors announce verdicts that are arguably inconsistent, courts are obliged to harmonize their findings on any reasonable interpretation that finds support in the evidence. See 9C. Wright & A. Miller, Federal Practice and Procedure §2513 (1971). That principle applies with even greater force to require acceptance of verdicts, fully supported by the evidence, that are claimed to be impaired only by speculative reasons why the jurors elected not to return verdicts on other counts. Rivera v. LaPorte, 896 F.2d 691, 694 (2nd Cir. 1990).

At issue is whether the acts were " . . . made possible only because the wrongdoer is clothed with the authority of state law". United States v. Classic, 313 US 299, 326 (1941) (emphasis added). In instructing the jury the Trial Court correctly explained that "the acts must have been of a kind [and] occurred under circumstances that would not have existed but for the fact that BLAKE WILLETT was a police officer using or purporting to use his official powers". (R 1335).

Both the Trial Court and the Appellate Division found sufficient evidence to support the verdict.

Rule 10 of the Rules of the Supreme Court of the United States provides that a petition for writ of certiorari will be granted only for compelling reasons including a situation where

> (c) a state court ... has decided an important question of federal law ... in a way that conflicts with relevant decision of this court.

Petitioners argue that the "Appellate Division's opinion is in direct conflict to this court's decision in Monroe v. Pape, supra, and the Second Circuit Court of Appeals decision in Rivera v. LaPorte, 896 F2d 691 (1990)", (see Petition at page 8). There is, however, nothing in the decision of the Appellate Division which suggests any change in the meaning of the phrase "color of law" as it is used in 42 USC §1983.

A review of the Appellate Division's decision shows that the Court simply found that plaintiffs did not "demonstrate that the defendant was acting 'under color of law' at the time of the act in question" (citation omitted). While the initial confrontation came about because WILLETT was present in his capacity as a police officer, the Court found sufficient evidence that the

harmful acts occurred after WILLETT stopped acting in his official capacity or while exercising his responsibilities pursuant to State Law.

The final sentence of Rule 10 cautions that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The gravamen of the instant petition amounts to nothing more than an asserted error in weighing the conflicting evidence. The trial judge and the four judges of the Appellate Division have been unanimous in their opinion. The New York Court of Appeals has also found no compelling reason to exercise its judicial discretion to review the determination.

CONCLUSION

The decision sought to be reviewed contains no misstatement of the rule of law. No compelling reason has been shown to grant review on writ of certiorari. Justice demands that finality be accorded the Decision and Order of the Appellate Division and that plaintiffs be placed in a position free to pursue any other cause of action available to them.

Dated: Merrick, New York
July 12, 1996

Respectfully submitted,

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